## ALLOY AUTOMOTIVE SDN. BHD. v. PERUSAHAAN IRONFIELD SDN. BHD.

**[S.C. (Lee Hun Hoe C.J. (Borneo), Seah & Mohamed Azmi S.C. JJ.) February 6 & September 28, 1985]**

**[Kuala Lumpur – Federal Court Civil Appeal No. 134 of 1984]**

*Practice and Procedure – Application to amend Defence and Counterclaim before hearing of appeal – Summary Judgment – Breach of contract – Allegation of variation of contract and estoppel – Triable issues – R.H.C. 1980, O.20 rr. 5 & 81 – R.S.C., 1980, rr. 51 & 58 – Courts of Judicature Act, 1964, s. 43.*

*Contract – Breach of – Variation – Novation – Whether party entitled to rescind – Contracts Act, 1950, s. 63.*

In this case the registered proprietors of the land had agreed to sell the land to the respondents. The respondents in turn agreed to sell the land to the appellants. The sale was subject to the approval of the State Authority. This approval was given and the respondent therefore requested the appellant to pay the balance of the purchase price in accordance with the agreement.

The appellants failed to pay the balance. The appellant alleged that the parties had agreed to vary the terms of the agreement as regards the sale of the land to the sale of the entire issued shares of the respondents' company to the appellants. All the shareholders of the respondents except the three major shareholders had signed the transfer. The respondents applied for an order under Order 81 of the Rules of the High Court 1980 for rescission of the agreement of sale. After hearing the parties the learned Judge of the High Court made an order in terms. The appellants appealed and on the appeal applied for the application for amendment of the Defence and Counterclaim to be heard before the appeal.

**Held**: (1) in this case the appellants could not possibly go to the High Court which had given judgment summarily for the respondents. Where the High Court is in no position to grant the application for amendment, it would be wrong for the appellate court to do so just when it was about to hear the appeal. Having regard to the conclusion reached by the court in setting aside the summary judgment rescinding the contract and in view of rule 58 of the Supreme Court Rules 1980 it is unnecessary for the court to deal with the application in this appeal;

(2) in this case the defence is alleging not only variation but also estoppel which was not dealt with by the learned Judge. In view of this it could not be said that the liability for breach of contract had clearly been established. The appeal must therefore be allowed and the appellants be given unconditional leave to defend.

*Cases referred to:*

(1) *Midland Bank Trust Co. Ltd. & Anor.* v. *Green & Ors. (No. 2)* [1979] 1 All E.R. 726.
(2) *Ellis* v. *Scott* [1965] 1 All E.R. 3.
(3) *Yamaha Motor Co. Ltd.* v. *Yamaha Malaysia Sdn. Bhd.* [1983] 1 M.L.J. 213.
(4) *Williams* v. *Home Office* [1982] 2 All E.R. 564, 568.
(5) *Langdale* v. *Danby* [1982] 3 All E.R. 129.
(6) *Yat Tung Investment Co. Ltd.* v. *Dao Heng Bank Ltd.* [1975] A.C. 581.
(7) *Khan* v. *Goleccha International Ltd.* [1980] 2 All E.R. 259, 269.
(8) *Dawkins* v. *Prince Edward of Saxe Weimar* (1875-76) 1 Q.B.D. 499, 501.
(9) *Tindok Besar Estate Sdn. Bhd.* v. *Tinjar Co.* [1979] 2 M.L.J. 229.
(10) *Loh Holdings Sdn. Bhd.* v. *Peglin Development Sdn. Bhd.* [1984] 2 M.L.J. 105.
(11) *Syarikat Bunga Raya Timor Jauh Sdn. Bhd.* v. *Tractors Malaysia Berhad* [1980] 2 M.L.J. 127.
(12) *Tong Lee Hua* v. *Yong Kah Chin* [1981] 2 M.L.J. 1.
(13) *United Malayan Banking Corporation* v. *Palm & Vegetable Oils (M) Sdn. Bhd.* [1983] 1 M.L.J. 206.
(14) *Government of Malaysia* v. *Adnan bin Awang & Ors.* [1980] 2 M.L.J. 291.
(15) *Payana Reena Saminathan & Anor.* v. *Pana Lana Palaniappa* [1914] A.C. 618, 622.
(16) *Johnson & Anor.* v. *Agnew* [1979] 1 All E.R. 883.
(17) *European Asian Bank A.G.* v. *Punjab and Sind Bank (No. 2)* [1983] 1 W.L.R. 642; [1983] 2 All E.R. 508.

SUPREME COURT.

*Raja Abdul Aziz Addruse* (*Philip Choong* with him) for the appellant.

*C.V. Das* (*Wong Kuo Shing* with him) for the respondent.

*Cur. Adv. Vult.*

**Lee Hun Hoe C.J. (Borneo)** (delivering the Judgment of the Court): For convenience the application to amend the Defence and Counterclaim and the appeal are dealt with together. A Solicitors' Certificate of Urgency was filed on January 28, 1985 for the said application to be heard before the appeal. This is very unusual.

We would summarise the facts. Plaintiff/respondent is a private limited company. Choo Chak Low, See Hon and Lee Thong @ Lee Tong are the registered proprietors in equal shares of a piece of land held under H.S. (M) 896, P.T. No. 168, Mukim Batu, Tempat 2388, Jinjang Utara Kepong together with the factory erected thereon. The land is subject to a restriction that it shall not be transferred, charged or leased without the consent of the State Authority. The respondent became a beneficial owner of the land by virtue of an agreement dated October 10, 1979 (called the co-proprietors' agreement) entered between three registered co-proprietors, namely See Hon and Lee Thong @ Lee Tong on the one part and Choo Chak Low on the other part. Under the co-proprietors'

agreement See Hon and Lee Thong @ Lee Tong agreed to sell their respective 1/3 share of the land to Choo Chak Low. The latter would incorporate a private limited company, *i.e.*, the respondent. The land would then be transferred to the respondent as the sole proprietor thereof. The co-proprietors undertook to apply to the State Authority for consent to transfer the land to the respondent.

By an agreement dated December 29, 1980 the respondent as beneficial owner agreed to sell and the defendant/appellant to buy the land together with the factory building erected thereon at the purchase price of $435,000 payable at the times and in the manner and upon the terms and conditions provided in the said agreement. The agreement provided, *inter alia,* that:–

1) the appellant shall pay $43,500 by way of deposit and part payment;

2) the appellant shall pay a further sum of $43,500 on or before April 1, 1981 as part payment;

3) the balance of $348,000 shall be paid after deducting therefrom the amount owing to Lee Wah Bank Berhad for purpose of discharging the existing charge on the land within one month of the date of a written notice from the respondent that the requisite consent from the State Authority has been obtained and the land is registered in the respondent's name;

4) the respondent shall hand over the keys to the property upon the signing of the agreement and deliver vacant possession of the land on or before February 15, 1981;

5) if the applicant shall fail or neglect for whatever reason to pay the balance of the purchase price in accordance with the agreement the respondent shall be at liberty forthwith by notice in writing to the appellant to terminate the agreement.

Provisions are also made to protect the parties in the event that the consent of the State Authority to transfer the land cannot be obtained. In pursuance of the agreement the appellant paid a total of $87,000. On February 15, 1981 the appellant went into occupation of the said land.

By a letter dated January 21, 1982 the Land Office informed the respondent's then solicitors of the approval of the transfer of the land to the respondent. By a letter dated February 15, 1982 the respondent informed the appellant of the aforesaid approval and requested the appellant to pay the balance of the purchase price in accordance with the agreement. The appellant failed to pay the balance of the purchase price or to redeem the land or to complete the purchase within one month from the date of notification of approval. As a result, the co-proprietors were unable to effect a registration of the transfer of the land to the respondent. It was also discovered that a caveat was lodged by the Public Bank as security for loans and advances granted to the appellant. On July 1, 1982 the respondent's solicitors gave the appellant's solicitors notice by letter to pay the balance of the purchase price within 7 days from receipt of the letter, failing which the respondent would treat the agreement as terminated. The appellant failed to comply with the notice within 7 days.

The appellant averred that the agreement dated December 29, 1980 had been varied in that the parties agreed to vary the terms of the agreement as regards the sale of the land to the sale of the entire issued shares of the respondent's company to the appellant. By a letter dated February 10, 1982 Lee Wah Bank Berhad was informed, apparently by their solicitors Messrs Shook Lin & Bok, that the respondent had sold all its shares to the appellant. By a letter dated February 12, 1982 the appellant requested the respondent to provide all particulars of the respondent's company's account to enable the appellant's solicitors to effect the transfer of all shares of the respondent to the appellant. By a letter dated March 11, 1982 the appellant's former solicitors informed the respondent that they had received a cheque for $348,000. They requested the respondent to arrange for all shareholders of the respondent to execute the transfer. All the shareholders of the respondent except the three major shareholders, namely, Choo Chak Low (who is the Managing Director of respondent), Ko Chen Chun Nee Lu and Chin Foong Kheng had executed the agreement for sale of the entire shares of the respondent to the appellant. Consequently, the appellant believed that by virtue of the variation of the agreement the appellant need not comply with the terms of the said agreement as regards time for payment of the balance of the purchase price.

*The Application to amend Defence and Counterclaim*

By a Summons-in-Chambers dated October 10, 1983 the respondent applied, *inter alia,* for an order under Order 81 of the Rules of the High Court, 1980 for rescission of the agreement dated December 29, 1980. Strictly speaking, when such an application is made no defence need be filed. However, the defence was in fact filed in November, 1983 after the application was made. After hearing the parties the learned Judge on May 4, 1984 made an order in terms. He gave a certificate under Order 56 rule 2(2) of the Rules of the

High Court, 1980 that he did not require further argument in open court. Hence, the appeal. On January 28, 1985 the appellant applied for amendment of the Defence and Counterclaim to be heard before the appeal. This is an unusual and curious application.

Encik C.V. Das for the respondent strenuously objected to the application. He contended that the appellant could not just come to this court to apply for amendment before the hearing of the appeal. It is his submission that the application is premature and misconceived on the merit. References were made to the following relevant Rules of the Supreme Court:

"4. Where no other provision is made by any written law or by those rules, the procedure and practice in the Rules of the High Court 1980 shall *mutatis mutandis* apply."

"51. (1) The Court shall have all the powers and duties, as to amendment or otherwise, of the appropriate High Court, together with full discretionary power to receive further evidence by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner.

....

(5) The powers aforesaid may be exercised notwithstanding that the notice of appeal relates only to part of the decision, and such powers may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties have not appealed from, or complained of the decision."

"58. Wherever application may be made either to the High Court or the Court, it shall be made in the first instance to the High Court."

The relevant provision dealing with amendment is Order 20 rule 5 of the Rules of the High Court, 1980.

In *Midland Bank Trust Co. Ltd. & Anor.* v. *Green & Ors. (No. 2)*[1] an application made for leave to serve a defence pleading *plene administravit* after judgment was dismissed. Oliver J. also held that the court's jurisdiction under Order 20 rule 5 of the Rules of the Supreme Court 1980 to permit the amendment of pleadings even after judgment did not apply because there was no defence on the record that could be amended and it would not be an appropriate use of Order 35 rule 2 of the Rules of the Supreme Court to set aside the order giving judgment merely to enable the defendant to plead *plene administravit* or *plene administravit praeter.*

By the amendment the appellant is seeking to raise the defence of estoppel which, unfortunately, was not dealt with by the learned Judge. Further, amendment after judgment by an appellate court is limited. In *Ellis* v. *Scott*[2] the plaintiff agreed to sell to the defendant an invention at a price to be paid by instalments. As an instalment was due the plaintiff obtained judgment for part of the price. The trial Judge rejected the only defence put forward, that is, that there had been a variation of the contract and that in consequence the sum was not due. After judgment the defendant discovered that the plaintiff had earlier assigned the invention to a limited company. On appeal, the defendant moved to set aside the judgment, to adduce further evidence relating to the assignment and to amend his defence to allege total failure of consideration. The Court of Appeal set aside the judgment and ordered a new trial of that issue alone and gave leave to the defendant to amend the defence and to adduce new evidence.

*Yamaha Motor Co. Ltd.* v. *Yamaha Malaysia Sdn. Bhd & Ors.*[3] makes clear the general principle that the court will allow amendments as will cause no injustice to the parties. To do so three basic questions would have to be considered: (a) whether the application was *bona fide;* (b) whether the prejudice caused to the other side can be compensated by costs and (c) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character. It was submitted that the the appellant's chances in the appeal. The applica- The application, it is said, is an attempt to improve the appellant's chance in the appeal. The application is meaningful only if this court is to allow the appeal and order a trial of the action. Cumming-Bruce, L.J. in *Williams* v. *Home Office*[4] expressed his views in these words at page 568:

"... In my view, it would be quite wrong for this court to give leave to amend knowing that the consequence of such leave must be that if the plaintiff's appeal was successful before their Lordship's House if leave to appeal was given, the only practical consequence could be that their Lordships would be invited to remit the question whether there was a claim for damages and, if so, what that claim was, to a court of first instance in order that evidence that could have been called below should be called, perhaps some years later.

For those reasons, I would refuse the plaintiff's application for leave to amend the statement of claim at this stage. To do so, to my mind, would be unreasonably to prejudice the defendant."

A principle of particular importance is that a successful litigant is not lightly to be deprived of his judgment which he secured by showing

that the defendant had no defence, frequently pursuing a recalcitrant and obstructive defendant. Where a plaintiff applied for summary judgment, there was no injustice in requiring the defendant to use such diligence as was reasonable in the circumstances to put before the learned Judge hearing the application, albeit in summary form, all evidence he relied on in the defence, whereas it would be a great injustice to the plaintiff to allow the defendant to introduce for the first time on appeal evidence which had been readily available at the hearing of the application but was not produced. See *Langdale* v. *Danby*.[5] To support the application for amendment by paragraph 7 of his affidavit dated January 26, 1985 Liew Mook raised the defence of estoppel in these words:

"7. At or about the time or shortly on the execution of the Agreement the Managing Director of the Plaintiff Company agreed that the sale of the said Property should be proceeded by way of sale of shares of the Plaintiff Company. As a result of which Messrs Teh Cheng Aik & Co., Solicitors for the Plaintiff and Defendant and the shareholders of the Defendant Company prepared an Agreement, a copy of which is annexed herewith marked exhibit "LM 1"."

As mentioned earlier all the shareholders except Choo Chak Low, Ko Chen Chun Nee Lu and Chin Foong Kheng executed the agreement. It was said that the above matter which could have been raised was never mentioned in his first affidavit dated January 23, 1984 in reply to Choo Chak Low's affidavit dated October 8, 1983. Neither was the matter mentioned before the learned Judge. His point was that the agreement dated December 29, 1980 "had been varied to the sale of the entire issued shares of the plaintiff company to the defendant." The judgment obtained by the respondent is a judgment on merit. It still stands until set aside by this court. The decision is *res judicata*. (See *Yat Tung Investment Co. Ltd.* v. *Dao Heng Bank Ltd & Anor.*[6] and *Khan* v. *Goleccha International Ltd.*[7]). The respondent urged the court to dismiss the application as the appellant should await the outcome of the appeal.

Raja Abdul Aziz Addruse for the appellant submitted that whether the amendment was allowed or not would depend on the circumstances of a particular case. Rule 51 of the Rules of the Supreme Court shows clearly the power of the court. Rule 58 applies to a normal situation. In this case the appellant could not possibly go to the High Court. He said that the question of estoppel was in fact raised as shown in paragraph 14 of Liew Mook's affidavit dated January 23, 1984 which reads:–

"14. I am advised and verily believe that the defendant has acted to their detriment in relying on the express variation of the agreement and the plaintiff is estopped from relying on the terms of the said agreement, in particular as regards the date for payment of the balance of the purchase price."

No new facts were raised. The appellant is not saying anything new.

Messrs. Shook Lin & Bok could not have written to Lee Wah Bank Ltd. the letter dated February 10, 1982 to say that "all the shares in the issued capital of Perusahaan Ironfield Sdn. Bhd. have been sold to Alloy Automotive Sdn. Bhd. whose solicitors are Messrs Teh Cheng Aik & Co." unless there had been some negotiation between the parties. Appellant wrote to respondent a letter dated February 23, 1982 after approval was given for transfer of land by the Pengarah Tanah dan Galian, Wilayah Persekutuan and after the above letter dated February 10, 1982 for certain documents with the view to effecting the transfer of all the shares in the respondent company to the appellant. Copy of this letter was sent to Choo Chak Low. Six out of nine shareholders of the respondent company executed the Agreement of Sale and Purchase of Shares in the respondent company. Why did the six sign the said Agreement? Was there an agreement to vary the manner of acquisition of the land – by purchasing the shares of the respondent company instead of purchasing the land? This would constitute a triable issue of fact which cannot be disposed of by affidavit evidence.

In his affidavit in reply dated January 23, 1984 and opposing the summary judgment, Liew Mook, the Managing Director of appellant set out the facts relating to the variation of the agreement by the transfer of shares instead of transfer of land. Paragraph 14 of the affidavit which was set out earlier referred to the variation of the agreement and stated that the respondent was estopped from relying on the terms of the agreement.

In his affidavit dated April 30, 1984 Choo Chak Low did not answer the matters raised in the above affidavit of Liew Mook. There is force in the appellant's contention that an affidavit must reply specifically to allegations, and if it does not, then those allegations not replied to must be taken to have been accepted. In *Dawkins* v. *Prince Edward of Saxe Weimar*[8] Blackburn, J. stated:

"Now, upon that, if that is the true state of the case,

we are of opinion that no cause of action can be shewn. Colonel Dawkins does not meet that in the affidavit in reply ..."

It is the contention of the appellant that if the allegations concerning the change in the mode of the acquisition of land are true then the defence of estoppel constitutes another triable issue. Further, the respondent had never informed the appellant that it did not agree with the change in the mode of acquisition of the land and that it was insisting on its strict rights under the agreement dated December 29, 1980.

Clause 2(b) of the Agreement dated December 29, 1980 seems ambiguous in that the last part of the clause says that payment has to be done after "the said property is registered in the name of the vendor." This is clearly impossible to comply with. The bank must be paid first in order to have the property redeemed. It is only after the property has been redeemed that the property can be registered in the name of the vendor. In order for the bank to be paid the purchaser must comply with the first part of Clause 2(b) within one month of the vendor's notice that consent of the authority has been obtained. Clearly, it is not possible to have the property registered first and still comply with the first part of Clause 2(b) within the deadline of one month. It is therefore not surprising that Mr. Choong who appeared for the appellant in the court below stated that he was not relying on Clause 2(b). However, estoppel was raised in paragraph 14 of the affidavit of Liew Mook. It was not answered by Choo Chak Low in his affidavit in reply. Both questions of variation and estoppel were raised in Liew Mook's affidavits but the question of estoppel was not argued. Hence the learned Judge did not deal with the question of estoppel as he ought to have done in deciding whether there was a triable issue.

As to the variation agreement (LM-4), Mr. Wong for the respondent submitted in the court below that it was impossible for the respondent to sign LM-4 because the respondent could not sell its own shares. The respondent is a limited company. It cannot sell its own shares. It is not a party to LM-4. At any rate the respondent as a limited company cannot sell its own shares. The shareholders can sell their own shares. The shareholders may be a party to LM-4 but certainly not the respondent. It is on this basis that the learned Judge considered that the contention of variation failed.

Messrs Wang Suo Shing & Co., solicitors for the respondent, wrote to Messrs Teh Cheng Aik & Co., solicitors for the appellant, letter dated July 8, 1982 at page 86 of the Apeal Record:—

"As for paragraph 3 of your said letter we are to inform you as follows:—

(i) you must be aware that the duly stamped Memorandum of Transfer from the Owners to our client are held by Messrs Shook Lin & Bok who will release the same to you together with title and discharge documents upon payment of the redemption sum. We refer to Messrs Shook Lin & Bok's letter to you dated February 11, 1982 and copy of their letter to Lee Wah Bank Ltd. dated February 10, 1982 which was also forwarded to you."

The appellant submitted that there was no question of the respondent not knowing of the arrangement.

The appellant distinguished the various cases cited by the respondent. In *Midland's* case[1] judgment was obtained in default of defence and the application was made to the same court. New evidence was discovered in *Ellis* v. *Scott*[2] so leave was given. Here there is no question of new evidence. As regards *Yamaha's* case[3] there is nothing to show that in the instant case it was not *bona fide.* Everything was disclosed. Prejudice does not apply in this case. Also, there is nothing here of changing the suit from one character to another. *Williams* v. *Home Office*[4] does not apply to the instant case. The appellant is not asking for leave to adduce further evidence as in *Langdale's* case.[5] So, it is not applicable. With reference to *Yat Tung Investment's* case[6] and *Khan's* case[7] it was submitted that *res judicata* could never apply on appeal. If estoppel has not been raised in the pleadings then it is something new.

The power of amendment is that of the High Court. Rule 51(1) of the Rules of the Supreme Court, 1980 gives the appellate court a similar power but Rule 58 makes it clear that when an application may be made either to the appellate court or High Court it shall be made in the first instance to the High Court. Section 43 of the Courts of Judicature Act, 1964 also makes similar provision as Rule 58. In this case the appellant could not possibly go to the High Court which had given judgment summarily for the respondent. Where the High Court is in no position to grant such application it would be wrong for the appellate court to do so just when it was about to hear the appeal. Having regard to the conclusion reached by the court in setting aside the summary judgment rescinding the contract and in view of Rule 58 of the Supreme Court Rules, 1980 we do not

find it necessary to deal with the application in this appeal. In fact such an application was considered and refused by this court in *Tindok Besar Estate Sdn. Bhd.* v. *Tinjar Co.*[9] Such an application will only be permitted on very good and strong grounds.

*Appeal*

Because the appellant did not pay the balance of the purchase price after due notice in writing was given, the respondent sought, *inter alia,* for a declaration rescinding the agreement dated December 29, 1980. The defence is that there is a variation as to the mode of acquisition of the land through the purchase of shares in the respondent company. Only six out of nine shareholders signed the proposed variation agreement. However, the three majority shareholders, namely, Choo Chak Low, Ko Chen Chun Nee Lu and Chin Foong Kheng did not sign the said agreement. Neither did they sign the share transfer forms. Of the six Choo Koong Wah also did not sign the share transfer form.

It is the submission of the appellant that the matter of variation would require oral evidence. There are other issues that need to be tried. These cannot be ventilated through affidavit evidence alone. Further, because the appellant had been led to believe that there was variation in the mode of acquiring the property by the acquisition of shares the respondent could not insist strictly on legal rights under the original agreement without giving sufficient and reasonable notice.

By a letter dated January 21, 1982 Messrs Shook Lin & Bok were advised that the Pengarah Tanah dan Galian, Wilayah Persekutuan had consented to the transfer of the land to Perusahaan Ironfield Sdn. Bhd., the respondent. On July 1, 1982 the respondent's solicitors wrote to the appellant solicitors. Paragraph (3) states clearly:

"(3) Clause 2(b) of the said Agreement provides as follows:—

'The balance of the Purchase Price amounting to Ringgit Three Hundred & Forty Eight Thousand ($348,000/—) shall be paid by the Purchaser to the Vendor *after deducting therefrom the amount owing to the said Bank for purposes of discharging the existing charge* over the said Property *within one (1) month of the date receipt of a written notice from the Vendor that the requisite Consent of the State Authority is obtained and the said Property is registered in the name of the Vendor.*' ".

By the same letter the respondent's solicitors gave the appellant's solicitors 7 days' notice "to redeem the said property from Lee Wah Bank Berhad and release the balance sum thereof to our client immediately." They also asked the appellant to pay the interest which the respondent had to bear as a result of the delay. Further, they asked the appellant to pay rental for use and occupation of the factory. They indicated that if the above matters were not complied with they would consider the agreement as terminated.

On July 6, 1982 the appellant's solicitors replied denying that they were in breach of the Sale Agreement dated December 29, 1980. They went on to say:

"... At all material times our clients were and are able and willing to comply with the provisions of the said Agreement. This is evidenced by the payment to us as solicitors to hold as stakeholders of the sum of Ringgit $348,000/— being the balance of the purchase price on March 11, 1982. However, despite our letters to your clients dated March 11, 1982, April 14, 1982 and June 4, 1982 and the follow up reminders sent by our clients to your clients your clients to date have failed to call at our office to execute the Memorandum of Transfer and other relevant documents including depositing with us the valid Consent of the Ruler-in-Council of the transfer by your clients to our clients of the said Property."

The respondent's solicitors replied on July 8, 1982 pointing out that the respondent had responded to their letters to execute the relevant documents and that Choo Chak Low had called at the appellant's solicitors' office on several occasions but at no time was he instructed to execute the Memorandum of Transfer. It was pointed out that if the appellant's solicitors as stakeholders had refused to release the money on their own accord they could put the appellant in trouble. Paragraph (c) of the letter states:

"(c) it is clear from Clause 2(b) of the Sale and Purchase Agreement dated December, 1980 that the balance purchase price of $348,000/— less the redemption sum payable to Lee Wah Bank must be paid to our client one month after written notice has been given to your client of the State Authority's Consent to transfer the said Property from the Landowners to our client. This was done vide our client's letter dated February 15, 1982.

You must then pay the redemption sum to Lee Wah Bank to discharge the said Property in order that the same may be registered in our client's name. It is clear that the consent for transfer of the Property to our client is the event for the payment and release of monies."

The appellant's solicitors were informed that:

"(i) you must be aware that the duly stamped Memoran-

dum of Transfer from the Owners to our client are held by Messrs. Shook Lin & Bok who will release the same to you together with title and discharge documents upon payment of the redemption sum. We refer you to Messrs Shook Lin & Bok's letter to you dated February 11, 1982 and copy of their letter to Lee Wah Bank Ltd. dated February 10, 1982 which was also forwarded to you.

(ii) a copy of the consent referred to in (b) was already forwarded to your client. Our client is however prepared to let you have the original simultaneously with payment of the purchase price."

The letter concluded as follows:

"We wish to add that in the circumstances your client is already in breach of the Sale and Purchase Agreement but that our client on grounds of reasonableness has given your client the said 7 days period to fulfil its obligations and compensate our client for damages in which event our client is prepared to complete this transaction. Our client will not extend the time for compliance under any circumstances and will CERTAINLY treat the Agreement as terminated by reason of your client's breach at the expiry of the said 7 day period."

In their reply dated July 12, 1982 the appellant's solicitors state:—

"Strictly without admission of liability and more as a show of good faith our clients have instructed us to enquire from you as solicitors for the Vendor abovenamed if you could give us your undertaking to forward to us the documents as enumerated in paragraph 3 of our letter dated July 6, 1982 within seven (7) days upon us paying to Lee Wah Bank Bhd. the redemption sum and the balance to you (less the retention sum for Real Property Gains Tax)."

On July 21, 1982 the respondent's solicitors replied and state:

"The position as regards the documents you referred to in your aforesaid letter is already clearly explained in our letter dated July 8, 1982.

Furthermore we are to point out that your client has failed to comply with the terms and conditions of the sale as set out in our letter of July 1, 1982 within the 7-day period, which is clearly stipulated to be crucial and of the essence."

On these facts the appellant submitted that there are triable issues. First, had there been an agreement to alter the mode of acquisition. Secondly, was the respondent aware of the agreement to acquire the property through the purchase of the company's shares. Thirdly, if the company is aware of the alternative mode then it is estopped from insisting on time requirement without giving reasonable notice. The following cases were cited in support: *Loh Holdings Sdn. Bhd.* v. *Peglin Development Sdn. Bhd*[10]; *Syarikat Bunga Raya Timor Jauh Sdn. Bhd.* v. *Tractors Malaysia Berhad*[11]; *Tong Lee Hua* v. *Yong Kah Chin*[12]; and *United Malayan Banking Corporation* v. *Palm & Vegetable Oils (M) Sdn. Bhd.*[13] Therefore, the appellant submitted that judgment ought not to have been entered in favour of the respondent by the learned Judge.

The respondent pointed out that there was really never any serious dispute on the facts. After the first agreement there was an abortive attempt by some shareholders to sell their shares thus varying the mode of acquisition of the land. It was considered by the respondent at the outset. The abortive agreement was never completed. This is clear from the Defence filed. Also, paragraph 10 of Liew Mook's affidavit dated January 23, 1984 states:

"10. By a letter dated April 14, 1982 the Defendant's Solicitors confirm that there were still three (3) outstanding shareholders, namely Choo Chak Low, Ko Chen Chun Nee Lu and Ching Foong Kheng who have not executed the legal documentation. The said Solicitors further confirmed receipt of the sum of Malaysian Ringgit Three Hundred Forty Eight Thousand Only (M$348,000.00) being the balance of purchase price for the said Property paid to the Defendant's Solicitors as stakeholder."

Apparently, Liew Mook still believed that there was variation when the three majority shareholders refused to sign. Paragraph 11 of his above affidavit states:

"11. I verily believe that by virtue of the variation of the said Agreement the Defendant need not comply with the terms of the said Agreement as regards the time for payment of the balance of purchase price."

Paragraphs 5 and 6 of the Defence state as follows:

"5. In breach of the terms of the Agreement as varied by the parties set out in paragraph 2 herein the Plaintiff has failed and or neglected to arrange for execution of the Agreement by all the shareholders of the Plaintiff's Company.

6. The Defendant was at all times willing and ready to proceed with the terms of the varied agreement and have deposited the balance of purchase price with the Defendant's Solicitors, M/s Teh Cheng Aik & Co."

In his counterclaim the appellant prays for specific performance of the varied agreement and damages and costs. The respondent however pointed out that the varied agreement had never been completed.

The respondent submitted that what the appellant termed variation was in actual fact novation. The appellant must bring itself within section 63 of

the Contracts Act. (See *Government of Malaysia* v. *Adnan bin Awang & Ors.*[14]). This is also the position in common law. See *Payana Reena Saminathan & Anor.* v. *Pana Lana Palaniappa.*[15] On the pleadings it was submitted that the appellant had not satisfied section 63 of the Contracts Act.

Clause 4 of the agreement dated December 29, 1980 deals with consent and transfer. Under Clause 4(b) the purchaser is given the option to terminate the agreement if the necessary consent to transfer is rejected or if the Memorandum of Transfer is not registered by the authority. Under Clause 4(b) if the purchaser opts to stay he shall have to pay a monthly rent of $4,300. Applications of Clause 4(b) and (c) are personally guaranteed by Choo Chak Low. (See page 39 of the Appeal Record). Clause 9 makes time the essence of the agreement. The notices in writing were given. The first notice was given on July 1, 1982 when the respondent's solicitors wrote to the appellant's solicitors informing the latter to pay the balance of $348,000 after deducting the amount due to the bank in discharging the existing charge. This letter has been referred to earlier.

Consent to transfer was given by the Pengarah Tanah dan Galian, Wilayah Persekutuan, Kuala Lumpur by a letter dated January 21, 1982. A photostat copy of the said latter was sent by the respondent to the appellant on February 15, 1982. The letter also advised the appellant to settle the balance of the purchase price amounting to $348,000 and the factory rental of $6,000 for four months at $1,500 per month, that is, November, 1981 to February, 1982. Letters were exchanged between the parties. A further notice was given by the respondent's solicitors to the appellant's solicitors on February 8, 1982 which was mentioned earlier. This letter was also in reply to the appellant's letter dated July 6, 1982 requesting the respondent to forward certain documents including, *inter alia,* two valid letters of consent issued by the Ruler-in-Council, one permitting transfer from the owners to the respondent and another permitting transfer from the respondent to the appellant. The matter eventually came before the learned Judge.

A resolution was purported to be made by the respondent's company to appoint two additional directors. It was supposed to be signed by four directors. However, three directors, namely, Choo Chak Low, Ko Chen Chun Nee Lu and Chin Foong Kheng did not sign. Neither did they sign the share transfer forms.

In his book on "The Sale and Purchase of Real Property in Malaysia" Professor Visu Sinnadurai deals with the circumstances under which a party to a contract for sale of land may rescind for a breach. He states at page 345:

> "A party to a sale of land, as seen earlier, may rescind the contract if the other party has breached an essential obligation of the contract for sale. It is therefore important to determine whether the breach committed is a breach of an essential term....".

He then sets out the essential obligations of the parties. Where the purchaser failed to complete the contract on time thus preventing the vendor from redeeming existing charges the vendor is entitled to rescind the contract and sue for damages. See *Johnson & Anor.* v. *Agnew.*[16]

In *European Asian Bank A.G.* v. *Punjab & Sind Bank (No. 2)*[17] the plaintiffs claimed as negotiating bankers that the defendants as issuing bankers were liable to them for the principal sum of US$2,250,000 due under the letter of credit. The plaintiffs issued a summons for judgment under Order 14 of the Rules of the Supreme Court. Staughton J. rejected the contention that the plaintiffs were agents for collection but held that there was a triable issue on the question whether the defendants were estopped from denying that the plaintiffs were entitled to negotiate the letter of credit and gave the defendants unconditional leave to defend. In allowing the appeal the Court of Appeal held that since on the evidence there was no triable issue either on the crucial question of estoppel or any other issue or question in dispute which ought to be tried and there was no reason for which there ought to be a trial of the action or any part of it, and further since the court differed from the Judge only on issues of law, the Court of Appeal should substitute its own view for that of the Judge and gave judgment for the plaintiffs under Order 14 rule 3(i) of the Rules of the Supreme Court, 1980.

The only evidence of estoppel before the learned Judge is that based upon the variation as indicated by Liew Mook in paragraph 14 of his affidavit dated January 3 1984 which was set out earlier. The respondent submitted that the learned Judge was right to take the view that there was no issue to go to trial when he gave summary judgment. On the other hand, the appellant contended that the learned Judge had not dealt with the question of estoppel. Variation and novation have nothing to do with estoppel. The fact that the three persons did not sign the transfers of shares

does not mean that estoppel cannot be raised. Further, it was submitted that the appellant was not given reasonable time to complete. It is the submission of the appellant that there are triable issues to be tried. Reference was made to a passage in *European Bank* case[17] at page 659 which reads:

"... There was no evidence before the judge that the defendants had in any way acted or failed to act, in reliance upon that misrepresentation; indeed the misrepresentation was not even pleaded in the defendant's points of defence. But the judge felt that he should not shut the defendants out from proving, if they could, that they had relied on it."

It should be pointed out that the Court of Appeal considered that the learned Judge's approach to the matter was not correct. It was pointed out that the fact of misrepresentation was known to the defendants in 1981 at the time of the stay proceedings. In his affidavit dated March, 1981 the defendants' solicitors stated that it would be necessary to ascertain whether the defendants were misled by it. In their points of defence, served over a year later in July, 1982, there was no plea whatsoever on this representation. A misrepresentation is in itself of no relevance in law. It is not right that leave to defend an action should be given to enable a party to hunt around for evidence to show that he has acted upon a misrepresentation, especially when he has had over a year to discover that evidence before the summons for judgment is heard.

The summary jurisdiction conferred by Order 81 must be used with great care. It provides a procedure similar to Order 14. Where all the issues are clear, summary judgment should be given. A defendant ought not to be shut out from defending unless it is very clear that he has no case in the action. A complete defence need not be shown. The defence set up need only show that there is a triable issue or question or that for some reason there ought to be a trial. Here the defence is alleging not only variation but also estoppel which was not dealt with by the learned Judge. In view of this it could not be said that the liability for breach of contract had been clearly established. Accordingly, we would allow the appeal with costs and set aside the order of the learned Judge and give the appellant unconditional leave to defend. Deposit shall be refunded to the appellant.

*Appeal allowed.*

Solicitors: *Philip Choong & Co.; Wang Kuo Shing & Co.*

## BECA (MALAYSIA) SDN. BHD. v. TAN CHOONG KUANG & ANOR.

**[S.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Seah S.C. JJ.) May 6 & September 30, 1985]**

**[Kota Kinabulu – Federal Court Civil Appeal No. 280 of 1984]**

*Contract – Contract for sale of flats – Contract made before issuance of Developer's Licence to Vendors – Claim for return of booking fee – Agreement voidable at instance of purchaser – Distinction between agreement and contract – Housing (Control and Licensing of Developers) Rules, 1980, r. 10(2) – Housing (Control and Licensing of Developers) Enactment, 1978 – Contracts Act 1950, ss. 2 & 66.*

*Conveyancing – Sale of flat – Contract made before issuance of Developer's Licence to Vendors – Claim for return of deposit – Whether contract voidable.*

*Housing Developers – Agreement voidable at instance of purchaser – Election.*

In this case the appellants were housing developers. The respondents had agreed to buy three units of flats from the appellants and paid a deposit of $20,000.00. The deposit was made before the issuance of the Developer's Licence to the appellants. The respondents subsequently refused to sign the Sale and Purchase Agreement and claimed a refund of the deposit. The learned President of the Sessions Court held that the deposit was meant to be a booking fee and not part payment. The appellants had not obtained the licence and permit at the time of collecting the deposit and therefore they were not authorised to collect the deposit. He therefore ordered the refund of the deposit. An appeal to the High Court was dismissed. The appellant appealed to the Supreme Court.

**Held**: the agreement in this case was valid but was voidable at the instance of the buyers. The buyers had elected to avoid the agreement and they were entitled to claim for the return of the deposit.

*Cases referred to:*

(1) *Mary-Ann Arrichiello* v. *Tanglin Studio Pte. Ltd.* [1981] 2 M.L.J. 60.
(2) *Daiman Development Sdn. Bhd.* v. *Mathew Lui Chin Teck & Anor.* [1981] 1 M.L.J. 56.
(3) *Kin Nam Development Sdn. Bhd.* v. *Khau Daw Yau* [1984] 1 M.L.J. 256.
(4) *Yeep Mooi* v. *Chu Chin Chua & Ors.* [1981] 1 M.L.J. 14.
(5) *John B. Skilling & Ors.* v. *Consolidated Hotels Ltd.* [1979] 2 M.L.J. 2.
(6) *Curragh Investments Ltd.* v. *Cook* [1974] 1 W.L.R. 1559, 1563; [1974] 3 All E.R. 658.
(7) *Raymond Banham & Anor.* v. *Consolidated Hotels Ltd.* [1976] 1 M.L.J. 5.

SUPREME COURT.

*Lawrence Thien* for the appellants.
*Stephen K.S. Foo* for the respondents.

*Cur. Adv. Vult.*